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February 1, 2011

Filed Electronically

Hon. Michael A. Shipp, U.S.M.J.
District of New Jersey
Martin Luther King, Jr. Federal Building & U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

Re: Renaissance Carpet and Tapestries, Inc. v. S&H Rugs et ano.
Civil Action No. 09 -CV- 00632 (SRC-MAS)

Dear Judge Shipp:

The parties in the above-entitled action submit this joint status letter pursuant to Your Honor's order of January 28, 2011, in anticipation of the telephone status conference of February 8.

Plaintiff's Statement:

Discovery

As authorized at the parties' status conference on December 10, plaintiff has conducted the resumed deposition of defendant Ori Wilbush and the deposition of Stephanie Cornett. Defendants have provided additional documents as directed by the Court, leaving only the following discovery issues unresolved:

E-mails. (a) Format. Only a single issue remains relating to formatting of defendants' e-mails, which appears from defendants' agreement in this letter to have been resolved. Defendants have produced e-mails in varying formats, with different numbering systems that plaintiff believes are bound to cause confusion at trial. Specifically, while most of defendants' e-mails are Bates numbered, additional e-mails produced by defendants on January 7, though contained in numbered PDF files, are images of documents that have no Bates numbers. To avoid confusion, plaintiff has requested that defendants provide a set of those documents stamped with Bates numbers. Counsel indicates below that the failure to

Bates-stamp these documents was attributable to an attorney no longer at his firm, and that defendants will provide a properly numbered set of these exhibits.

(b) Missing e-mails. In addition to those e-mails that have been irretrievably lost because of defendants' failure to preserve evidence, defense counsel have on several occasions referred to other "missing e-mails" that presumably remain accessible: first, during Mr. Wilbush's December 9 deposition, stating, "it is possible that we may have inadvertently eliminated some responsive e-mails," and twice again in a December 23 letter, stating, "We have begun the process of examining the withheld documents to determine if there is any evidence that e-mails were excluded" and "if a carpet was known to be an 'SH-' number linked to a disputed design, it is possible that it could have been excluded." Plaintiff has been seeking production of these "eliminated" or "excluded" e-mails from defendants, and reiterates its request to the Court. Defendants respond below by providing a lengthy, and largely irrelevant history of the efforts and documents that have been required to obtain their clients' e-mails. Virtually all that correspondence relates to issues that have been resolved, often with the Court's assistance. Defendants now appear to state that, despite counsel's thrice-repeated statements that e-mails may have been "eliminated" or "excluded," no such e-mails in fact exist. Plaintiff asks only for defendants' unequivocal statement to that effect. A letter to that effect, rather than the lengthy description of the history of plaintiff's efforts to obtain defendants' documents, would have been sufficient.

Images of Rugs. Since the outset of discovery, plaintiff has been seeking high-resolution images of rugs in the disputed designs that were sold by defendants. Defendants have produced only poor copies of plaintiff's own images of defendants' rugs that were attached to the complaint. Despite defendants' discussion below about other rugs, all that is at issue here is images of defendants' rugs, including the images that were provided to defendants' purported expert, David Castriota. Plaintiff believes it is entitled to the best images defendants have of their own rugs. Defendants are also required by Rule 26(a)(2)(B)(ii) and (iii) to provide clear copies of the images defendants provided to their purported expert. The photocopies provided to plaintiff are in black-and-white and are virtually illegible. Plaintiff knows from the expert's report that he worked from color images that were more legible. Defendants can presumably easily provide those images to plaintiff in the form of the native format e-mails sent to their expert.

Motions

Plaintiff has moved pursuant to *Daubert v. Merrell Dow Pharmaceuticals* to preclude the testimony of defendants' purported expert, with a motion date of February 22. Now that depositions have been concluded and defendants have produced additional documents, plaintiff is preparing its motion for sanctions for spoliation of evidence, as authorized by the Court. While defendants chastise plaintiff for not making that motion earlier, the motion depends in part on the materials belatedly produced by defendants and the deposition of Ms.

Cornett, whose identity had been concealed by defendants, and whose deposition yielded testimony relevant to the issue of spoliation. It was prudent for plaintiff to await that discovery. Having done so, plaintiff has filed its *Daubert* motion and is in the process of preparing its spoliation motion.

Defendants indicate below that they intend to move for summary judgment, as does plaintiff. Defendants are evidently of the view that the motions to preclude expert testimony and for sanctions ought to be considered simultaneously with summary judgment motions. Plaintiff is of the view that resolution of the motions to preclude expert testimony and to preclude other evidence and establish presumptions or inferences as a result of defendants' spoliation of evidence will substantially affect the nature and merits of any motions for summary judgment. Accordingly, plaintiff submits that, with the *Daubert* motion already served and the spoliation motion in preparation, any scheduling order should be based on resolution of those motions prior to the submission of any motions for summary judgment.

Defendants' Response

We grow increasingly frustrated regarding adversary counsel's misrepresentations of the record and the activity between the parties.

E-mails. (a) Format. The associate responsible for making the last production of documents is no longer with us, and I was unaware that a production had been without Bates numbers. We will provide our adversary with a numbered set of the documents.

Defense counsel mischaracterizes the events that have occurred. Our office produced emails in .pdf format on or about November 17, 2010. (See **Exhibit A**.) Plaintiff's counsel requested clarification of our email search process on November 18, 2010 (See **Exhibit B**), to which we responded on November 19, 2010. (See **Exhibit C**.) After being informed by Plaintiff's counsel that some emails contained attachments that were not legible, we wrote to Plaintiff's counsel on November 29, 2010 requesting that he identify which attachments were not legible. (See **Exhibit D**.) Plaintiff's counsel then identified these illegible emails (See **Exhibit E**), to which we responded and provided these same emails in their native format on December 1, 2010. (See **Exhibit F**.) After Plaintiff's counsel reviewed our first native production, he then requested that a complete set of emails be produced in native format. (See **Exhibit G**.) On the same day that we provided a complete set of native format emails to Plaintiff's counsel (See **Exhibit H**), he wrote us a letter forwarding additional keyword search terms. (See **Exhibit I**.) We agreed on December 23, 2010 to produce native format emails using these additional terms. (See **Exhibit J**.) On January 7, 2011, our office produced a complete copy of all emails in native format – one set using Defendants' keyword search terms and one set using Plaintiff's terms. (See **Exhibit K**.) Upon receipt of this additional production, Plaintiff's counsel requested that we attach Bates numbers to the emails themselves, rather than the file names. (See **Exhibit L**.)

(b) Missing e-mails. Adversary counsel's incomplete and inaccurate description of events at the deposition of Mr. Wilbush indicates that we excluded e-mails referring to **disputed** designs. The opposite is true. What I said at Mr. Wilbush's deposition was that, based on the testimony of the witness and the methodology employed in an attempt to limit non-responsive documents, we may have inadvertently excluded some e-mails that were responsive (specifically, of designs for which there were multiple copies in inventory and, thus, those with more than one inventory number.) Adversary counsel fails to inform the court that after Mr. Wilbush's deposition and at his request we ran a new keyword search of the e-mails using terms that he had suggested and which resulted in a supplemental production on January 7, 2010. To the extent that any e-mails may have inadvertently omitted in the first production, they were included in the supplemental production.. All responsive documents were produced at that time.

As the foregoing plainly demonstrates, we have responded to all of Plaintiff's counsel's requests. Defendants have, and continue to, complied in good faith with its discovery obligations. Discovery is complete.

Images of Rugs. Plaintiff's assertion concerning any failure to produce images is simply not true. Beginning in January of 2010, we made available for inspection in our office various visual arts materials relevant to this case. Those items that could be copied were copied and sent to our adversary. Our office thereafter provided in excess of 56,000 high-resolution images of the carpets in Defendants' inventory. We first provided these images on October 26, 2010 in .pdf format. (See **Exhibit M**.) We provided extensive spreadsheets that matched the Bates numbers to Defendants' inventory numbers – both in order by Bates numbers and in order by inventory numbers. (See **Exhibit N**.) On November 8, 2010, we provided these images on a hard drive to Plaintiff's counsel in their native format as we received them from Defendants. (See **Exhibit O**.) We have provided Plaintiff's counsel with every image available and we are confused as to why he continues to make a request that was completed months ago.

Our office has provided clean, high-resolution, and very legible copies of all images of historic rugs provided to our expert, David Castriota, both in digital format and in their original publications. On November 2, 2010, we informed Plaintiff's counsel that original copies of catalogs and books containing these images were available at our office for his inspection. (See **Exhibit P**.) On November 15, 2010, Plaintiff's counsel requested high-resolution images used in our expert report. (See **Exhibit Q**.) We sent all of the catalogs and books (containing the original historical designs copied by plaintiff) via courier to Plaintiff's counsel on November 22, 2010, which were all clearly tagged with appropriate labels. (See **Exhibits R & S**.) We additionally provided a CD of all historic rug images available to us at the time. (See **Exhibit R**.) As more auction catalogs became available to us after this initial production, we provided these additional images on January 7, 2011. (See **Exhibit K**.) Again, we have provided Plaintiff's counsel with everything he seeks and are confused as to why he continues to make these requests. The contention that our adversary has not received copies of the rugs in the best available format, both paper and digital.

Motions

Plaintiff correctly states that we intend to move for summary judgment. The issues raised by plaintiff's Daubert motion and the summary judgment motion are closely related. Our summary judgment motion is ready to be filed as soon as this Court determines that the case if ready to set a pre-trial date. Plaintiff's counsel was given leave months ago to bring whatever motion for sanctions he thought was appropriate and has done nothing. A briefing schedule is, in our view, appropriate.

Very respectfully,

/s/ Ronald W. Meister

Ronald W. Meister
Attorney for Plaintiff

/s/ Jay R. McDaniel

Jay R. McDaniel
Attorney for Defendants

cc: Courtesy copy to court (via fax 973-645-4412)
Jay R. McDaniel (via fax 201-845-3777)